

STATE OF MICHIGAN
COURT OF APPEALS

B & H MEDICAL, LLC,

Plaintiff-Appellant,

v

AIR SUPPLY, INC. and JOHNSON MORGAN &
WHITE,

Defendants-Appellees.

UNPUBLISHED

January 2, 2014

No. 311364

Wayne Circuit Court

LC No. 10-010805-CZ

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting reconsideration to defendant Johnson, Morgan & White and dismissing plaintiff's amended complaint under MCR 2.116(C)(7) as time-barred. Plaintiff also appeals the trial court's order granting summary disposition to defendant Air Supply, Inc. under MCR 2.116(C)(7) and (8). We affirm in part, reverse in part, and remand for further proceedings against defendant Johnson, Morgan & White.

I. DEFENDANT ASI

A. STATUTE OF LIMITATIONS

Plaintiff first argues that the trial court erred in granting defendant ASI's motion for summary disposition on statute of limitations grounds. In particular, plaintiff argues that its two remaining tort claims,¹ injurious falsehood and negligence, were not barred by the three-year limitations period embodied in MCL 600.5805(10), because there was a genuine issue of material fact on when the harm to plaintiff occurred.

This Court reviews de novo a decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When a court decides whether to grant

¹ Plaintiff concedes that the trial court properly dismissed its claim of business defamation as being barred by the one-year statute of limitations.

summary disposition under MCR 2.116(C)(7), it must accept the allegations as true unless contradicted by the evidence submitted by the parties. *Maiden*, 461 Mich at 119; *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008). Summary disposition under MCR 2.116(C)(7) may be granted when the statute of limitations has expired. *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 6; 687 NW2d 309 (2004).

Plaintiff filed its complaint on September 17, 2010. The period of limitations for defamation is one year, MCL 600.5805(9), and as plaintiff admits, this claim was properly dismissed as untimely filed. Injurious falsehood and negligence fall within the catch-all limitations period of three years. See MCL 600.5805(10) and *Kollenberg v Ramirez*, 127 Mich App 345, 354-355; 339 NW2d 176 (1983). Under MCL 600.5827, the period of limitations begins running at the time “the claim accrues,” which is when the wrong upon which the claim is based is done. See also *Brennan v Edward D Jones & Co.*, 245 Mich App 156, 158; 626 NW2d 917 (2001). The Supreme Court has made it clear that “[t]he wrong is done when the plaintiff is harmed rather than when the defendant acted.” *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 388; 738 NW2d 664 (2007), quoting *Boyle v Gen Motors Corp*, 468 Mich 226, 231 n 5; 661 NW2d 557 (2003). In the case of libel, the period of limitations begins running from the time of publication. *Hawkins v Justin*, 109 Mich App 743, 746; 311 NW2d 465 (1981). The period does not restart if the libel is republished. *Mitan v Campbell*, 474 Mich 21, 25; 706 NW2d 420 (2005).

With respect to ASI, the facts are undisputed that ASI incorrectly reported to JMW in January 2006 that plaintiff owed a debt of \$414.00. That same month ASI retracted at plaintiff’s request the statement of alleged debt, specifically asking JMW in writing not to report or collect on the debt. Consequently, the harm to plaintiff relative to ASI occurred when ASI sent to JMW the initially incorrect statement of debt owed, which again undisputedly occurred in January 2006. Accordingly, the trial court did not err when it found no genuine issue of material fact regarding when the information was submitted by ASI to JMW, and properly held that the tort claims were barred by the three-year statute of limitations.

B. BREACH OF CONTRACT

Plaintiff also argues that the trial court erred in granting defendant ASI summary disposition on the breach of contract claim under MCR 2.116(C)(8). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings to determine whether the plaintiff stated a claim upon which relief could be granted. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court did not err in holding that plaintiff failed to state a claim upon which relief could be granted. In its amended complaint, plaintiff did not plead that ASI breached any particular contractual provision, and did not allege that there was a contractual duty to not report any alleged debt to a collection agency. Additionally, plaintiff’s amended complaint specifically asserts that once both parties satisfied their contractual obligations—and they both did—no further duties existed between them. Contrary to plaintiff’s assertion on appeal, defendant did not rely on a “reverse economic loss doctrine” theory, but rather argued that the parties completed the only contract between them and reporting incorrect information to a collection agency did not constitute a breach of that contract. Accordingly, the trial court properly granted defendant ASI’s motion for summary disposition on the breach of contract claim.

II. DEFENDANT JMW

With respect to defendant JMW, plaintiff continues to argue that the cause of action accrued in April 2008, and so the three-year statute of limitations had not expired for the injurious falsehood and negligence claims. Specifically, plaintiff argues that there was no affirmative evidence supporting defendant JMW's assertion that publication first occurred in January 2006, and there was evidence indicating that JMW held back reporting the derogatory remarks until 2008, when it collected enough to submit them in bulk for a discount. This Court reviews de novo a decision to grant or deny summary disposition, *Maiden*, 461 Mich at 118, while we review for an abuse of discretion a trial court's decision to grant or deny reconsideration. *Huspen v T & H, Inc*, 200 Mich App 162, 167; 504 NW2d 17 (1993).

As defendant JMW argues on appeal, a trial court generally will not grant a motion for reconsideration that merely presents the same issues the court has already ruled on; rather, the moving party must demonstrate that the court and the parties have been misled by a palpable error. MCR 2.119(F); *Huspen*, 200 Mich App at 167. The trial court granted JMW's motion for reconsideration because it had determined that it had made a legal error when it initially denied JMW summary disposition on the theory of continuing violation by republication, which was rejected in *Mitan*, 474 Mich at 25. For that reason, the trial court denied plaintiff's motion to reconsider the order granting reconsideration of its order denying JMW's motion for summary disposition. A legal error can constitute an abuse of discretion. *Lima Twp v Bateson*, 302 Mich App 483, 502; 838 NW2d 898 (2013).

Unlike with respect to ASI, the claim against JMW accrued—and thus the limitations period began—when the derogatory information was first published to the collection reporting agencies. *Mitan*, 474 Mich at 25; *Trentadue*, 479 Mich at 388. Consequently, the trial court was correct that continuous publication does not restart the limitations period. *Mitan*, 474 Mich at 25; *Trentadue*, 479 Mich at 388. However, plaintiff created a genuine issue of material fact regarding when JMW first reported the information to the credit bureau. Both parties provided evidence suggesting alternative dates as to when JMW could have supplied the debt information to the credit reporting agency. In its responses to both summary disposition motions, plaintiff alleged through affidavits that the derogatory remarks were placed for the first time in April 2008.

Specifically, in his first affidavit submitted in response to ASI's summary disposition motion, Harold Greenberg testified that he checked plaintiff's credit history often and, in early April 2008, he observed for the first time that a new entry appeared on B & H's credit history. In his second affidavit filed in response to JMW's summary disposition motion, he stated that he had checked the credit report at least weekly since 2006 (or earlier) and, in April 2008, observed for the first time a derogatory comment concerning the \$414. Plaintiff suggested, based on a conversation between plaintiff's counsel and a representative of JMW, that the delay resulted from JMW saving up negative comments and submitting them all at once at a discounted rate. Although plaintiff did not offer direct evidence that this bulk submission practice resulted in two-year delays in submission, either by JMW or by collection agencies in general, it raised an inference that JMW could have first reported the debt in April 2008.

To the contrary, JMW submitted the credit report and a letter from plaintiff's counsel. The April 11, 2008 letter to JMW from plaintiff's attorney informed the company that plaintiff "was recently furnished with an Experian credit report, and it shows a negative remark entered by your firm in January 2006." The Experian credit report submitted by JMW is not clear as to what the "01/06" notation addresses—is it when JMW informed the credit bureau about the purported debt (or that the information was in error), or does the date only reflect when the creditor, ASI, closed its account with plaintiff? The date listed might also indicate the date collection efforts ended. Although there was no direct evidence to establish that the date reflected when JMW reported the debt, a reasonable juror could certainly infer from the document that the debt was first reported by JMW to Experian in January 2006. Consequently, there is a genuine issue of material fact on JMW's statute of limitations argument, as a jury must determine which evidence is more credible or persuasive as to when JMW reported the alleged bad debt to Experian. Consequently, the trial court abused its discretion in denying plaintiff's motion for reconsideration.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

No costs, neither party having prevailed in full. MCR 7.219(A).

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan